(J-50)



In The

# Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1369

COMMITTEE FOR PUBLIC EDUCATION AND RELIGIOUS LIBERTY, BERT ADAMS, BARBARA BROOKS, NAOMI COWEN, ROBERT B. ESSEX, FLORENCE FLAST, CHARLOTTE GREEN, HELEN HENKIN, MARTHA LATIES, BLANCHE LEWIS, ELLEN MEYER, REV. ARTHUR W. MIELKE, EDWARD D. MOLDOVER, ARYEH NEIER, DAVID SEELEY, HOWARD M. SQUADRON, CHARLES H. SUMNER and CYNTHIA SWANSON,
*Appellants,*

*— against —*

EDWARD V. REGAN, as Comptroller of the State of New York, and GORDON AMBACH, as Commissioner of Education of the State of New York,
*Appellees,*

- and -

HORACE MANN-BARNARD SCHOOL, LA SALLE ACADEMY, LONG ISLAND LUTHERAN HIGH SCHOOL, ST. MICHAEL SCHOOL and YESHIVAH RAMBAM,
*Intervening Parties-Appellees.*

## MOTION TO DISMISS OR AFFIRM

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## MOTION TO DISMISS OR AFFIRM

The appellees move the Court to dismiss this appeal, or in the alternative, to affirm the judgment below on the grounds that the appeal does not present a substantial Federal question and that it is manifest that the questions on which the decision of the cause depends are so unsubstantial as not to need further argument.

## QUESTION INVOLVED

Does the reimbursement by the State of nonpublic schools for costs of record keeping and testing violate the Establishment Clause of the First Amendment to the Constitution of the United States, where the records are kept and the tests are administered pursuant to requirements of State law and regulation for the purpose of determining whether or not the nonpublic schools are complying with the State's compulsory attendance laws, both in terms of actual attendance of pupils upon instruction and in terms of the requirement that such nonpublic schools provide an acceptable prescribed minimum standard of education to the pupils so enrolled?

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Constitutional provision involved is the Establishment of Religion Clause of the First Amendment to the Constitution of the United States, which provides:

> "Congress shall make no law respecting the establishment of religion * * *."

The prohibition of that section has been made applicable to the States by virtue of the Fourteenth Amendment to the Constitution of the United States (*Cantwell* v. *Connecticut*, 310 U. S. 296 [1940]).

Chapter 507 of the New York Laws of 1974 provides as follows in pertinent part:

> "Section 1. Legislative findings. The legislature hereby finds and declares that:
>
> "The state has the responsibility to provide educational opportunity of a quality which will prepare its citizens for the challenges of American life in the last decades of the twentieth century.
>
> "To fulfill this responsibility, the state has the duty and authority to evaluate, through a system of uniform state testing and reporting procedures, the quality and effectiveness of instruction to assure that those who are attending instruction, as required by law, are being adequately educated within their individual capabilities.
>
> "In public schools these fundamental objectives are accomplished in part through state financial assistance to local school districts.
>
> "More than seven hundred thousand pupils in the state comply with the compulsory education law by attending nonpublic schools. It is a matter of state duty and concern that such nonpublic schools be reimbursed for the actual costs which they incur in providing services to the state which they are required by law to render in connection with the state's responsibility for reporting, testing and evaluating.
>
> * * *
>
> "§ 3. Apportionment. The commissioner shall annually apportion to each qualifying school, for school years beginning on and after July first, nineteen hundred seventy-four, an amount equal to the actual cost incurred by each such school during the preceding school year for providing services required by law to be rendered to the state in compliance with the requirements of the state's pupil evaluation program, the basic educational data system, regents examinations, the statewide evaluation plan, the uniform procedure for pupil attendance reporting, and other similar state prepared examinations and reporting procedures.
>
> * * *
>
> "§ 7. Audit. No application for financial assistance under this act shall be approved except upon audit of vouchers or other documents by the commissioner as are necessary to insure that such payment is lawful and proper.
>
> "The state department of audit and control shall from time to time examine any and all necessary accounts and records of a qualifying school to which an apportionment has been made pursuant to this act for the purpose of determining the cost to such school of rendering the services referred to in section three of this act. If after such audit it is determined that any qualifying school has received funds in excess of the actual cost of providing the services

enumerated in section three of this act, such school shall immediately reimburse the state in such excess amount."

* * *

Chapter 508 of the New York Laws of 1974, amending chapter 507, provides as follows in pertinent part:

> "§ 9. In enacting this chapter it is the intention of the legislature that if section seven or any other provision of this act or any rules or regulations promulgated thereunder shall be held by any court to be invalid in whole or in part or inapplicable to any person or situation, all remaining provisions or parts thereof or remaining rules and regulations or parts thereof not so invalidated shall nevertheless remain fully effective as if the invalidated portion had not been enacted or promulgated, and the application of any such invalidated portion to other persons not similarly situated or other situations shall not be affected thereby."

## FACTS

Plaintiffs (appellants) commenced this action seeking to have Chapters 507 and 508 of the New York Laws of 1974 declared unconstitutional, alleging that they violate the Establishment Clause of the First Amendment to the Constitution of the United States. Plaintiffs also alleged that the statutes violate the Free Exercise of Religion Clause of the First Amendment in that they prevent the free exercise of plaintiffs' religion through compulsory taxation to support religious schools. The complaint also seeks an injunction restraining the implementation of the laws, insofar as they provide money for sectarian schools.

A motion to intervene in the action was made by a group of nonpublic schools which are beneficiaries of payments under the act. The motion was granted.

Interrogatories were served by plaintiffs on the defendants and intervenor-defendants. The answers to those interrogatories have been served on the plaintiffs, filed with the District Court, and are a part of the record in this case.



The facts are not in dispute. On May 23, 1974, then Governor Malcolm Wilson signed Chapters 507 and 508 of the Laws of 1974, to become effective July 1, 1974. The statute directs the Commissioner of Education of the State of New York to apportion and pay to nonpublic schools in the State the actual cost incurred by the schools during the preceding school year for providing services required by law to be rendered to the State in compliance with the requirements of the State's Pupil Evaluation Program (PEP), the Basic Educational Data System (BEDS), Regents Examinations, the Statewide Evaluation Plan, the Uniform Procedure for Pupil Attendance Reporting, and "other similar state prepared examinations and reporting procedures".

Payments are to be made only on vouchers audited by the State Comptroller; the schools must keep records showing expenditures and costs of record keeping and test administration. The Comptroller may also examine the books and records of any qualifying school and if the school is shown to be overpaid, the school must immediately reimburse the State for the amount overpaid.

The expressed purpose of the statute, as set forth in the first section of the act, is to evaluate, through a system of uniform State testing and reporting procedures, the quality and effectiveness of instruction to assure that those who are attending instruction, as required by law, are being adequately educated within their individual capabilities. The statute recognizes that the costs of the same testing and similar reporting regulations are financed for public schools through public funds.

The expressed purpose of the statute is to provide compensation to the nonpublic schools for those services mandated by State law or by regulations of the Commissioner of Education, in connection with the State's responsibility for reporting, testing and evaluating the quality of education being provided to nonpublic school pupils.

New York State has set minimum standards of educational quality through the requirements of various sections of the New York Education Law, such as the provisions of Article 17 thereof, which require certain subjects to be taught in nonpublic as well as in public schools, and the provisions of sections 3204 and 3210 of the Education Law, which require that the educational offerings of nonpublic schools must be "at least substantially equivalent" to those of the public schools in the pupil's district of residence. Furthermore, subdivision 2 of section 305 of the Education Law, which provides for the general powers of the Commissioner of Education, states that he shall have the general supervision over all schools and institutions which are subject to the provisions of the Education Law or of any statute relating to education and that he must cause all these schools to be examined and inspected. [An outline of statutory requirements is contained in Exhibit 1 to Commissioner Nyquist's answers to plaintiffs' interrogatories, entitled "Laws, Regulations and Guidelines Apportionment to Nonpublic Schools".]

For the purpose of controlling the educational quality of the State education system, various measuring devices are used by the Education Department, such as the Regents' examinations, which test acquired knowledge relative to specific courses of study, the so-called "PEP Tests" (Pupil Evaluation Program) in grades 6 and 9, as well as other testing devices which require the results of such tests to be reported to the Education Department. These measuring devices are used in relation to both public and nonpublic school pupils.

In addition, various reports are required from nonpublic as well as public schools, all of which procedures and devices have the purpose of assuring that the minimum State educational standards are maintained throughout all the schools in the State, both public and nonpublic alike.



As of February, 1975, there were 1954 nonpublic schools in the State of New York (Exhibit 7 to Commissioner Nyquist's Answers to Plaintiffs' Interrogatories), in which some 700,000 pupils were enrolled. Pursuant to the requirements of Chapter 507, the State Education Department has adopted a system of accounts, which must be maintained by nonpublic schools receiving aid pursuant to the act, which system requires the maintenance of accounts showing the actual costs to the schools for personal services, supplies, materials, and other contractual expenses, of the Pupil Evaluation Program, Basic Educational Data System, Regents Examinations, the Statewide Evaluation Program, and Pupil Attendance Reporting. It is those actual costs upon which reimbursement is based.

## ARGUMENT

**THE DECISION OF THE DISTRICT COURT IS IN ACCORD WITH WOLMAN v WALTER (433 US 299) AND PRIOR DECISIONS OF THIS COURT, SUPPORTING CAREFULLY DRAWN AND AUDITED PROGRAMS OF REIMBURSEMENT TO NON-PUBLIC SCHOOLS FOR PERFORMING SECULAR FUNCTIONS.**

The statutes at issue here, chapter 507, Laws of 1974, as amended by chapter 508, were enacted by the New York State Legislature following the decision of this Court rendered in *Levitt* v *Committee for Public Education*, 413 US 472 (Levitt I, 1973), to remedy the defects found by this Court in an earlier New York statute on the same subject. Whereas the earlier statute had provided reimbursement for testing prepared and conducted by teachers in nonpublic schools, the 1974 statutes provided reimbursement for the expense of grading only standardized tests prepared by the State Education Department. Although both the former and latter enactments also provided reimbursement for mandatory attendance-taking and reporting as well, which accounts for most of the cost involved, the bulk of the argument centered around the testing provisions.

In *Levitt I*, this Court held that insofar as the 1970 statute provided reimbursement for testing prepared and conducted by teachers in the nonpublic, sectarian schools, it had the effect of advancing religion or religious education and led to excessive entanglement by the State in the affairs of religious institutions. In addition, the statute provided a flat annual per-pupil grant* intended to cover projected reimbursable expenses. No accounting was required, and in case the grants actually exceeded costs in any given school, no refund of the excess was required.

While the Court was unwilling to assume that teachers in parochial schools would deliberately and consciously evade statutory and constitutional limitations by incorporating religious instruction into the reimbursed activities, it found a "potential for conflict" inherent in the situation that the State was unable to prevent (413 US at 480). Consequently, the Court held the 1970 statute unconstitutional under the First Amendment.

Guided by the decision in *Levitt I* and other decisions on the same subject (e.g. *Board of Education* v *Allen*, 392 U.S. 236, 20 L.Ed.2d 1060), the New York State Legislature enacted the statutes presently at issue here.

First, it provided reimbursement for the actual cost of taking attendance and reporting attendance figures to the State Education Department. Since the attendance of children at school in New York State is compulsory between the ages of six and sixteen years**, and since the attendance requirement may be satisfied in nonpublic and sectarian schools (*Pierce* v *Society of Sisters*, 268 US 510, 69 L ed 1070 [1924]), it is incumbent upon nonpublic schools to keep records of attendance***.

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* Twenty-seven dollars ($27) for each pupil in attendance in grades 1-6; forty-five dollars ($45) in grades 7-12.

** Educ. Law §3205.

*** Educ. Law §§3210, 3211.



This, however, is a purely secular activity which inures to the benefit of the children in attendance. The argument that such schools would probably take attendance anyway is speculative and beside the point. In any event, it cannot be argued that the schools would necessarily report periodically on attendance to the State, except as they are now required to do by law. Nothing contained in *Levitt I* would indicate any constitutional defect in this kind of reimbursement, save the fact that in the 1970 statute reimbursement was made on the flat grant system, with no accountability.

Second, the Legislature provided a system of reimbursement for expenses incurred in administering, and in some cases in grading standardized State examinations taken by public and nonpublic pupils alike, such as the "Regents" examinations (the end-of-course achievement tests), the Regents Scholarship tests, the Pupil Evaluation Program (PEP) and the Basic Educational Data System (BEDS). No teacher-prepared tests are reimbursable. The standardized State tests for which reimbursement is provided are objective, multiple-choice, mechanically-graded tests, except that some Regents exams will include essay-type questions, for which rating scales and criteria are provided. Those tests which are intially rated by teachers in the school are subsequently reviewed upon return to the State Education Department. Thus, the opportunity for sectarian teachers to grade tests on the basis of doctrine is extremely limited, and if any "potential for conflict" occurs (*Levitt I*), it *can* be corrected. As this Court said in *Levitt I*, it should not be assumed that teachers in parochial schools will act in bad faith. Here, the "potential for conflict" has been eliminated, and the State maintains an overview of the results to assure that its established grading standards are being adhered to.

Inevitably, of course, the 1974 statutes were challenged on constitutional grounds by the same group and individuals who had mounted the attack in *Levitt I*. At first the three-judge court in the Southern District of New York held the new

statutes unconstitutional. Although it found a secular legislative purpose (the first part of a three-part test devised in earlier decisions of this Court, see *Lemon* v *Kurtzman*, 403 U.S. 602, 29 L.Ed.2d 745 (1971) ), it also concluded that the "primary effect" of the new scheme was to advance religion, based on this Court's decision in *Meek* v *Pittenger*, 421 US 349, 44 L ed 2d 217 [1975]). Writing for the Court, District Judge WARD said:

> "Absent the decision in *Meek* v *Pittenger*, *supra*, we might have found defendants' arguments persuasive. However, in light of the decision in *Meek*, we fail to see any alternative but to declare the statute unconstitutional because it has the primary effect of advancing religion" (414 F Supp 1174, 1179).

On appeal to this Court by defendants, the judgment appealed from was vacated and the case remanded for further consideration in the light of *Wolman* v *Walter*, 433 US 229, decided June 24, 1977. Following remand, the same three-judge court sustained the constitutionality of the statute (Judge WARD dissenting) upon the decision of *Wolman*, *supra*.

It seems clear, from the foregoing history of this matter, that at least in June 1977, when the case was remanded, the decision in *Meek* v *Pittenger* was not regarded by a majority of this Court as conclusive on the present case.

The Court below explained its earlier decision in the present case by saying it had concluded that *Meek* v *Pittenger* held that "substantial aid to the educational function of [sectarian] schools * * * necessarily results in aid to the sectarian school enterprise as a whole". In other words, no distinction could be drawn between the secular and religious dimensions of education provided in sectarian schools, and thus, both aided the sectarian enterprise.

In *Wolman*, on the other hand, this Court upheld that part of an Ohio statute which supplied to students in nonpublic schools such standardized tests and scoring services as are in



use in public schools. The Ohio tests were prepared, administered and scored by state personnel exclusively. Justice Blackmun reasoned that because sectarian schools could not control the content or result of the examinations, there was no substantial danger that the exams would be used for religious teaching (433 US at 240).

Consequently, the majority below concluded that *Wolman* "must be viewed as rejecting the concept that State support for educational activities necessarily advances religion." The Court then gave consideration to whether the points of difference between the Ohio statute and the New York law were significant enough to render *Wolman* inapplicable. Again, the majority concluded that the risk of New York examinations being diverted to religious purposes "is altogether too insubstantial". Writing for the majority, Circuit Judge MANSFIELD said:

> "* * * The secular nature of the examinations and the almost entirely mechanical method prescribed for their administration as well as for attendance-taking precludes any substantial risk that the examinations or services will be used for injection or inculcation of religious views or principles, even in a pervasive religious atmosphere. The careful auditing procedure, moreover, insures that State aid will be restricted to these secular services."

Turning to the attendance-taking feature of the New York statute (not present in *Wolman*), the majority found that record-keeping is "essentially a ministerial task lacking ideological content or use * * *".

In short, we submit, the same three-judge District Court which had declared these statutes unconstitutional in 1976, on the strength of *Meek* v *Pittenger*, *supra*, now finds persuasive distinctions in this Court's more recent *Wolman* decision which are sufficient to uphold the statutes. In *Wolman*, this Court has adhered to its position in earlier cases (not followed in *Meek*) which permits state aid to those parts of a sectarian school's educational activities which have only secular values of legitimate interest to the State and which aid "does not present any appreciable risk of being used to aid transmission of religious views."

The decision below is in accord with prior decisions of this Court as expressed in *Wolman* v *Walter, supra.*

## CONCLUSION

**THE APPEAL SHOULD BE DISMISSED OR THE JUDGMENT BELOW AFFIRMED.**

Dated: April , 1979

Respectfully submitted,

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